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20 UNITED STATES DISTRICT COURT

21 FOR THE NORTHERN DISTRICT OF CALIFORNIA

22 OAKLAND DIVISION

23 EPIC GAMES, INC.,
24 Plaintiff, Counter-defendant
25
26 v.
27 APPLE INC.,
28 Defendant, Counterclaimant.

Case No. 4:20-cv-05640-YGR
Case No. 4:11-cv-06714-YGR
Case No. 4:19-cv-03074-YGR

**DEFENDANT APPLE INC.'S RESPONSE TO
NON-PARTY EPIC GAMES, INC.'S MOTION
FOR ADMINISTRATIVE RELIEF TO
ACCESS SEALED FILINGS IN RELATED
CASES**

Hon. Yvonne Gonzalez Rogers

20 IN RE APPLE IPHONE ANTITRUST
21 LITIGATION

22 DONALD R. CAMERON, *et al.*,

23 Plaintiffs

24 v.

25 APPLE INC.,

26 Defendant.

27 DEFENDANT APPLE INC.'S RESPONSE TO NON-PARTY EPIC GAMES, INC.'S MOTION FOR
28 ADMINISTRATIVE RELIEF TO ACCESS SEALED FILINGS IN RELATED CASES

INTRODUCTION

Epic’s Motion ignores the most salient fact in this dispute: Epic opted out of the *Cameron* class action and is therefore not a party—even a putative one—to either of the two remaining class actions before this Court. At this point, it is entitled to nothing beyond access to the public filings. Epic has already enjoyed more process than the typical opt-out class member. Even before the class-certification stage, Epic brought its own lawsuit, successfully sought an early trial date, and received all manner of Apple’s confidential and highly confidential materials. But the *Epic* trial concluded months ago, the evidentiary record there is now closed, and there is nothing in the sealed filings in different lawsuits for which Epic has any legitimate use. Epic’s Motion identifies no valid reason why Epic needs access to these materials or adequately explains what it intends to do with them.

Furthermore, Apple would be prejudiced because Epic cannot be trusted with Apple’s confidential materials. Even while denying this, Epic discloses in a footnote that it already has received and retained an unsealed version of Consumer Plaintiffs’ class certification papers and related expert report, which contain Apple’s confidential materials. (Mtn. at 2, n.1.) During the months that counsel have been discussing the issue of Epic’s access to sealed materials, Epic *never before revealed* that it already had helped itself to some of the confidential information at issue without Apple’s consent. Apple is investigating this breach of the Court’s protective order and will address the issue with the Court as appropriate. The Motion now before the Court is too little, too late.

Epic made its own bed—it opted out of the *Cameron* case and jumped to the head of the line with its own trial. Now it has to lie in it—Epic is entitled to nothing beyond the public filings in *Cameron* (and *Pepper*), just like any other non-party to the litigation. Its bid for special treatment is not supported by the Coordination Order or any authority, and is inconsistent with Epic’s decision to opt out. Epic’s extraordinary request for access to sealed materials in other cases, which no other non-party has been afforded, should be rejected.

BACKGROUND

The trial in *Epic v. Apple* concluded on May 24, 2021, with the Court making clear that “[t]he record is the record. Whatever it is, there will be no addition.” May 20, 2021 Trial Tr. 3824; *see also* May 21, 2021 Trial Tr. 3870 (“Well, it’s got to be in the record if I’m going to consider it.”); May 24

1 Trial Tr. 4191 (“And by the end of the trial, I said okay, that’s it, no more pieces. There are no more
 2 pieces [of the puzzle] in that box. You may have wanted other pieces . . . but that’s it.”). Epic itself
 3 concedes, as it must, that “the Court will render its judgment in *Epic v. Apple* on the basis of the trial
 4 record developed in that case and the parties’ arguments.” (Bornstein Decl., Ex. C at 1.)

5 Immediately after the trial ended, Apple sent Epic and class plaintiffs a letter indicating that
 6 Epic would no longer be receiving any discovery. (*Id.*, Ex. A at 1.) The following week, Apple sent a
 7 further communication to Epic and class plaintiffs confirming that class plaintiffs should not send the
 8 unsealed versions of their class certification reports and expert reports, which contain Apple
 9 confidential materials, to Epic either. (*Id.*, Ex. B at 1.) A few weeks later, Epic asked that Apple
 10 continue to produce documents in the ongoing class actions to Epic as well, and further asked Apple to
 11 serve Epic with unsealed versions of court filings in the class actions and that Apple consent to class
 12 plaintiffs doing the same. (*Id.*, Ex. C at 1-2.) Apple declined Epic’s requests, precipitating a telephonic
 13 meet and confer between the parties. During that discussion, Epic indicated that it needed the requested
 14 materials because Epic might seek to admit additional exhibits to the record in the *Epic* case, to
 15 potentially add material to its proposed findings of fact, or to challenge a judgment entered against it.
 16 (Declaration of Jay Srinivasan at P2.)

17 DISCUSSION

18 Epic’s request for special treatment, seeking non-party access to the sealed filings in the *Pepper*
 19 and *Cameron* class actions, boils down to the argument that these filings mention and discuss Epic
 20 and/or the evidentiary record of the *Epic* trial. If this were the rule, then Apple could be required to
 21 produce its high confidential materials to literally dozens of non-parties (such as Microsoft) whose
 22 materials are also mentioned or referenced in the parties’ class certification papers and expert reports.
 23 Unsurprisingly, Epic cites to no authority in support of the position that a non-party is entitled to sealed,
 24 non-public filings in a lawsuit simply because the non-party is referenced in certain filings. Nor does
 25 Epic point to any authority that would give Epic these special rights because it is a party in a related
 26 action in which the evidentiary submissions are completed, or because Epic is mentioned more than
 27 other non-parties.

28 Instead, there is clear caselaw directly contrary to Epic’s position. *See Kile v. United States*,

1 915 F.3d 682, 688-89 (10th Cir. 2019) (“Appellants, as of now, are non-parties to the action and are
 2 not entitled to the sealed transcript in this capacity.”). Relatedly, courts have made clear that Federal
 3 Rules have “no explicit provision for post-trial discovery” and when “trial is over[,] a fortiori, discovery
 4 is over.” *Flag Fables, Inc. v. Jean Ann’s Country Flags & Crafts, Inc.*, 753 F. Supp. 1007, 1016 (D.
 5 Mass. 1990). Courts especially disfavor post-trial discovery where parties like Epic “had ample
 6 opportunity to develop the pertinent facts through discovery, as well as to call witnesses and cross-
 7 examine witnesses during the trial.” *Aldridge on behalf of United States v. Corp. Mgmt. Inc.*, No. 1:16-
 8 CV00369 HTW-LRA, 2021 WL 1521697, at *1 (S.D. Miss. Apr. 16, 2021); *see also AngioScore, Inc.*
 9 v. *TriReme Med., Inc.*, No. 12-cv-03393-YGR, 2016 WL 9107419, at *1 (N.D. Cal. Jan. 7, 2016)
 10 (discussing the “highly unusual circumstances” that can support the “extraordinary remedy” of altering
 11 or amending a judgment); *AngioScore, Inc. v. TriReme Medical, Inc.*, No. 12-CV-03393-YGR, 2015
 12 WL 13376679, at *2 (N.D. Cal. Oct. 7, 2015) (denying motion to reopen discovery following trial).
 13 While these cases discuss the issue in the context of post-trial discovery, they reinforce the broader
 14 position that when the trial record is closed, a party has no right to additional materials, which would
 15 certainly apply to non-public filings from another case.

16 Contrary to Epic’s submission, the Court’s Order Regarding Coordination of Discovery does
 17 not speak to this issue. That order was intended to “minimize expenses and facilitate the orderly and
 18 efficient” process of discovery—not to provide Epic special rights once the trial record in its opt-out
 19 case was closed. Consumer ECF No. 194, Developer ECF No. 80. Epic’s context-free reading of the
 20 Coordination Order makes no sense and would require Apple to continue making document
 21 productions and expert disclosures to Epic long after its case was over. This was plainly not the Court’s
 22 intent. (Indeed, the Coordination Order was entered before the *Epic* suit was filed, and before Epic
 23 sought and received a trial date in advance of class certification.) And Epic’s reading also ignores that
 24 the Court issued a separate order in the *Epic* matter setting a separate non-expert and expert discovery
 25 cut-offs for Epic as distinct from the classes. Epic ECF No. 116. None of Epic’s arguments merit the
 26 post-trial special treatment it seeks.

27 Nor does Epic even attempt to explain to the Court (or Apple) why Epic needs the sealed filings
 28 or what it would do with that information. Epic argues that Apple’s experts are attempting to “relitigate

1 their disputes with Epic’s experts.” (Mtn. at 4.) But this is not true: Apple is responding to the
 2 arguments made by the class plaintiffs and their experts, a fact Epic well understands based on its
 3 unauthorized access to the Consumer Plaintiffs’ expert report, as well as to the voluminous materials
 4 available (with only minimal redactions) on the public record in both of the class actions. Moreover,
 5 what could Epic do even if it had access to the sealed information? It would have no basis to submit
 6 any filing in the closed *Epic* litigation, and it lacks standing to file anything in a lawsuit in which it
 7 expressly opted out (*Cameron*) or another one in which it is not even a member of the proposed class
 8 (*Pepper*). Epic notes that without the sealed materials, it “lacks the ability to review for accuracy, or
 9 seek corrections of, the class parties’ voluminous assertions about *Epic v. Apple* and Epic’s business”
 10 (*id.*) but again, Epic would have no standing to “seek corrections” even if it had access to these
 11 materials because it is not a party to the class actions. And while Epic complains of an unequal playing
 12 field, it ignores that Apple has access to the information in the class cases because it is the named
 13 defendant in those cases (and in others about its App Store); Epic, in contrast, is not a party at all. That
 14 Epic brought a different suit gives it no special rights here. Otherwise every other single plaintiff
 15 (developer or consumer) could demand all the confidential material in all the cases. That is not a road
 16 the Court should even begin going down.

17 To the extent Epic intimates that the burden is on Apple to demonstrate a legitimate interest for
 18 withholding confidential materials from Epic, that is incorrect. Apple, of course, bears no burden to
 19 demonstrate prejudice from sharing its confidential information with a non-party. Apple, like many
 20 litigants, has sought to limit the dissemination of its confidential and highly confidential information,
 21 and has successfully moved the Court to: (1) enter a Protective Order (to which Epic stipulated); and
 22 (2) to keep its own confidential information sealed in appropriate instances (just as Epic has done with
 23 its information). Apple has no obligation to disclose confidential materials to Epic or any other non-
 24 litigant, nor does Epic cite any authority holding otherwise.

25 Although Apple does not need to establish prejudice for this Court to deny Epic’s request for
 26 special treatment, Apple would be harmed if the Court were to award Epic the relief sought. First, Epic
 27 is waging war against Apple and Google here and abroad, and is obviously searching for ammunition
 28 to use in its well-publicized attacks. Apple is concerned that Epic wants to use the sealed information

1 in other litigation against Apple (e.g., in Australia) or in its lawsuit against Google, which is pending
 2 before Judge Donato—where Epic recently amended its allegations to make new accusations *about*
 3 *Apple* that were not raised in Epic’s suit against Apple.

4 Further, despite Epic’s bald assertion that “Apple has no basis to suggest Epic cannot be trusted
 5 to abide by the protective orders” (Mtn. at 5), Epic has demonstrated that it cannot be trusted with a
 6 party’s confidential materials. As noted at the outset, Epic buries in a footnote the concession that Epic
 7 obtained the sealed versions of the Consumer Plaintiffs’ class certification papers and accompanying
 8 expert report, which contain Apple confidential material, without Apple’s knowledge or consent.
 9 Worse still, Epic hid this fact from Apple for months and continues to retain this material despite
 10 knowing that it is not entitled to it without the Court order it is currently seeking. This misconduct
 11 alone should be sufficient basis to deny this Motion.

12 Epic is also an opt-out plaintiff in a lawsuit challenging Google’s Google Play store. Epic’s
 13 case against Google is related to two putative class actions (one brought by developers and one by
 14 consumers) as well as a lawsuit brought by various state attorneys general. Last week, the court in the
 15 Google actions denied Google’s motion to keep sealed various allegations in each of the four
 16 complaints. (*See* Srinivasan Dec., Ex. A at 1.) Per an emergency motion for a stay filed by Google,
 17 Google approached all four plaintiff groups immediately after the issuance of the court’s order, asking
 18 them to defer filing their unredacted complaints so Google could file a motion to stay pending
 19 reconsideration or appeal. (*Id.* at 1-2.) Google explained that an immediate filing of the unredacted
 20 complaints would deprive Google of meaningful relief. (*Id.*) The State AGs and both sets of class
 21 plaintiffs agreed to hold off filing their unredacted complaints while Google sought further review.
 22 Epic, however, ignored Google’s reasonable request, and rushed to file its unredacted complaint on the
 23 public docket, ensuring that Google’s (and Apple’s) confidential information would become public.
 24 (*Id.* at 2; *see also* Matthew Perlman, *Google Wants Play Store Info Shielded Despite Epic Unsealing*,
 25 Law360 (Aug. 23, 2021)).

26 Epic has shown no compunction about using confidential information publicly to press its
 27 broader agenda and the Court should make no order that gives Epic special license to pursue this
 28 improper purpose.

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2 Dated: August 24, 2021
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Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: /s/ Mark A. Perry
Mark A. Perry
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